might be priorities among classes of obligees according to the social utility of the class: a hospital might have prior claim to a manufacturer of luxuries, according to the schemes employed during the war. Within a given class priority should not be allowed unless by custom. Thus it seems to be customary for coal companies supplying small trade to fill orders according to the time they get them; the custom of such time priority might properly be given effect.

What shall be the *quantum* of the share? One formula used is: "the part of the cars due plaintiff each day is to the whole number of cars available for shipping coal that day, as the number of carloads due the plaintiff by the terms of the contract that day is to the number of carloads due all parties for that day."[24] In other situations, however, it may lead to fairer results to prorate according to customary needs, as evidenced by past dealings,[25] or "ratably" to distribute the supply "in proportion to the business of each manufacturer".[26] It might be convenient conditionally to frame such a formula, suited to the particular facts, and not to apply it where the obligor can show some overriding consideration for not applying it.

In installment contracts, the inability to perform should be excused only as to the installments during which the inability actually exists, and the contract be performable as to the rest. The obligee should have the election of accepting or rejecting partial performance of the installment,[27] unless a contract provision or custom is inconsistent with any election.[28] Where the obligor's default as to one installment is properly excusable, he cannot be compelled to perform that installment because of subsequent ability.[29]

REASONABLE AND PROBABLE CAUSE IN MALICIOUS PROSECUTION: FOR JUDGE OR JURY?—Reasonable and probable cause in malicious prosecution is generally defined as such a state of facts as would induce the ordinary prudent man to believe or to entertain an honest and strong suspicion that the person charged is guilty.[1] In the sense that this standard is a rule laid down by a court and not known to a layman, reasonable and probable cause is a question of law, just as is the stand-

[24]Luhrig Coal Co. *v.* Jones & Adams Co., *supra,* footnote 2, at p. 622. See Oakman *v.* Boyce, *supra,* footnote 9, at p. 485.

[25]As in the problem of distributing railroad cars among manufacturers during a shortage. See McKeefrey *v.* Connellsville Coke & Iron Co., *supra,* footnote 5, at p. 216; *cf.* Oakman *v.* Boyce, *supra,* footnote 9, at p. 483.

[26]McKeefrey *v.* Connellsville Coke & Iron Co., *supra,* footnote 5, at p. 217.

[27]*Cf.* Garfield, *etc.* Coal Co. *v.* Penn. Coal, *etc.* Co., *supra,* footnote 11, at p. 40.

[28]See *supra,* footnotes 2 and 4.

[29]See Metropolitan Coal Co. *v.* Billings, *supra,* footnote 11, at p. 461; *cf.* Davis *v.* Columbia Coal Mining Co. (1898) 170 Mass. 391, 396, 49 N. E. 629; New England Concrete Const. Co. *v.* Shepherd & Morse Lumber Co. (1915) 220 Mass. 207, 107 N. E. 917; *contra,* Rowland & Co. *v.* Lehigh Coal & Nav. Co. (1857) 28 Pa. St. 215, 221.

[1]See Bacon *v.* Towne & Others (1849) 58 Mass. 217, 238, (*per* Shaw, C. J.); Bowen *v.* W. A. Pollard & Co. (1917) 173 N. C. 129, 91 S. E. 711; Heyne *v.* Blair (1875) 62 N. Y. 19, 22; Virginia Ry. & Power Co. *v.* Klaff (Va. 1918) 96 S. E. 244, 246.

ard of negligence in the abstract.[2] But just as the inference of negligence from a set of circumstances is a question of fact, so the determination of what facts would induce the prudent man to start a prosecution is essentially a question of fact which twelve ordinary laymen are perhaps better qualified to decide than a judge.[3] This question, however, was reserved by the court to itself from an early date. This was done because when criminal prosecutions were begun by individuals the courts felt that unless they gave adequate protection to the prosecutor in case of acquittal, the fear of damages in a civil suit would outweigh love of justice and many crimes go unpunished.[4] Formerly this protection was given where there had been a prosecution for a felony, by the court's refusing to issue a copy of the indictment, which was essential to the plaintiff's success, if it thought there had been the least cause for the prosecution.[5] Soon the courts attained the same result by themselves construing the facts and determining what circumstances constituted reasonable cause, leaving to the jury only the finding of the particular facts.[6] It thus came to be said that reasonable cause is a matter of law.[7] Correctly stated all that was meant was that it is a matter of fact to be decided by the court.[8] Thus where the facts were undisputed or decided by special verdict, it was the court's duty to declare the existence or absence of probable cause.[9] There was a difficulty however where the facts were disputed, for the court could not order the jury to bring in a special verdict. If the jury insisted on its right to bring in a general verdict, it became necessary for the court to group the facts according to all possible findings and charge in the alternative.[10] It was then said that where the facts are disputed, rea-

---

[2]Clinchfield Coal Corp. *v.* Redd (Va. 1918) 96 S. E. 836, 843.

[3]See Burton *v.* St. Paul, *etc.* Ry. (1885) 33 Minn. 189, 192, 22 N. W. 300; Lister *v.* Perryman (1870) L. R. 4 H. L. 521, 538; Thayer, Evidence (1898) 226, 228.

[4]Hess *v.* Oregon Baking Co. (1897) 31 Ore. 503, 513, 49 Pac. 803; Stone *v.* Crocker (1832) 41 Mass. 81, 83; Thayer, *op. cit.*, 230.

[5]3 Bl. Comm. 126. A copy of the indictment was needed only where the plaintiff had been prosecuted for a felony, and does not appear to have been necessary even then in the later cases.

[6]Pain *v.* Rochester and Whitfield (1599) Cro. Eliz. 871; Chambers *v.* Taylor (1602) Cro. Eliz. 900; Mahaffey *v.* Byers (1892) 151 Pa. 92, 96, 25 Atl. 93; Masten *v.* Deyo (N. Y. 1829) 2 Wend. 425.

[7]Fagnan *v.* Knox (1876) 66 N. Y. 525, 527; Johnstone *v.* Sutton (1786) 1 T. R. 493, 545; Schott *v.* Indiana Nat. Life Ins. Co. (1914) 160 Ky. 533, 169 S. W. 1023, 1024.

[8]"The plain truth . . . is that . . . the courts still continue to retain the determination of a part of the total issue of fact. If this were confessed, instead of disguising a question of fact for the court under the name of a question of law, much confusion would be avoided." Thayer, *op. cit.*, 230. McCarthy *v.* Barrett (1911) 144 App. Div. 727, 729, 129 N. Y. Supp. 705.

[9]Vladar *v.* Klopman (N. J. 1916) 99 Atl. 330; Besson *v.* Southard (1851) 10 N. Y. 236; Molloy *v.* Long Island R. R. (1891) 59 Hun 424, 13 N. Y. Supp. 382. If the facts are disputed the court may request a special verdict of the jury and then make the inference of probable cause. Ross *v.* Kerr (1917) 30 Ida. 492, 167 Pac. 654.

[10]"The court should therefore by means of a hypothetical instruction group the facts which the evidence tends to prove, and instruct the jury

sonable and probable cause is a question for the jury.[11] This too is erroneous and has lead to confusion.[12] In all cases reasonable and probable cause is a question of fact; the only question, and the one which now concerns us, is whether it is for judge or jury.

In a recent case, *Grew* v. *Mountain Home Telephone Co.*,[13] the Appellate Division of the New York Supreme Court reversed the lower court which had held as a matter of law, although a material fact was in dispute, that the plaintiff had failed to show a want of probable cause. In that case the Appellate Court stated that "if the facts are in dispute, or admit of opposing inferences, the question [of probable cause] is for the jury."[14] This latter statement, as well as similar ones by the New York Court of Appeals and other courts,[15] gives rise to much speculation as to the true state of the law. If all that the court in the *Grew* case intended by "inferences" was "inferences of fact",

---

that, if they find such facts to have been established, they must find that there was or was not probable cause." Hess *v.* Oregon Baking Co., *supra,* footnote 4, at pp. 511, 512. In Haddrick *v.* Heslop (1848) 12 Q. B. 267, 275, Coleridge, J., charged the jury thus: "I tell you, if you think so and so, there was a want of reasonable and probable cause." See also, Bishop *v.* Frantz (1915) 125 Md. 183, 93 Atl. 412, 415; Jackson *v.* Hillerson (1915) 59 Pa. Super. Ct. 508, 515; Tyler *v.* Mahoney (1914) 166 N. C. 509, 82 S. E. 870, 872; Hall *v.* Suydam (N. Y. 1849) 6 Barb. 83, 87; Stewart *v.* Sonneborn (1878) 98 U. S. 187, 194.

[11]Scott *v.* Dennett Surpassing Coffee Co. (1900) 51 App. Div. 321, 325, 64 N. Y. Supp. 1016.

[12]It is reversible error for the court to charge the jury on probable cause in the abstract and permit it to make the inference. Hopkins *v.* Stites (Okla. 1918) 173 Pac. 449; Dunnington *v.* Loeser (Okla. 1915) 149 Pac. 1161, Panton *v.* Williams (1841) 2 Q. B. 169; Sanders *v.* Palmer (C. C. 1893) 55 Fed. 217; Masten *v.* Deyo, *supra,* footnote 6; Bulkeley *v.* Keteltas (1852) 6 N. Y. 384; *contra,* Clinchfield Coal Corp. *v.* Redd, *supra,* footnote 2.

[13](App. Div. 3rd Dept. 1920) 183 N. Y. Supp. 840.

[14]It is to be noted that this much was not necessary to the court's holding, for the lower court erred in refusing to let the jury say whether the destruction was accidental or not, a material question of fact, which was properly for the jury, and on which the inference of probable cause depended. Hart *v.* Leitch (1914) 124 Md. 77, 91 Atl. 782. Yet the Appellate Division undoubtedly intended to lay down a rule which was to guide the lower court in the new trial.

The various ways in which the issue here discussed may be squarely presented to the court are these: The lower court has given or refused to give the jury a blanket instruction on probable cause in the abstract, leaving to them the inference of probable cause; or it has left the issue to the jury where the facts and inferences are clear.

[15]The cases are full of such confusing statements which fail to distinguish between leaving to the jury inferences of facts and inferences of probable cause. Scott *v.* Dennett Surpassing Coffee Co. *supra,* footnote 11, at p. 325; Dann *v.* Wormser (1899) 38 App. Div. 460, 462, 56 N. Y. Supp. 474. In Neuowich *v.* Cohn (1916) 172 App. Div. 411, 158 N. Y. Supp. 344, the plaintiff appealed on the ground that the evidence introduced by him "raised an issue of fact for the jury to determine whether or not the defendant acted with malice and want of probable cause." The court stated that "the evidence shows that there was a clear issue of fact on the question of probable cause and malice, which ought to have been submitted to the jury on the count of malicious prosecution."

there is no change in the law;[16] but if it meant "inferences of probable cause",[17] the court has altered the law.[18] That the court meant the latter seems fairly certain, since it quoted with approval the case of *Heyne* v. *Blair*,[19] which had been previously approved in *Galley* v. *Brennan*,[20] both cases decided by the New York Court of Appeals. In *Heyne* v. *Blair*, where the facts were disputed, the court said: "It is pre-eminently a question for the judgment of twelve men to determine what upon a doubtful state of facts, or upon facts from which different men would draw different conclusions, would be the belief and action of men of ordinary caution and prudence." And again, the same court said, "Such is the rule in all questions of like character and there is no reason why this class of actions should form an exception to the rule." In *Galley* v. *Brennan*, where the facts were substantially undisputed, the court approved of *Heyne* v. *Blair* and seems unconsciously to have extended the law and made the inference of probable cause a question for the jury even when the facts are undisputed, if reasonable men would differ in acting upon such facts.[21] It is of course possible to interpret the language of the court in the principal case as meaning only "inferences of facts", but in the light of the vigorous approval of that part of *Heyne* v. *Blair* just quoted, it is highly improbable that the court intended merely that. Still the New York courts err in assuming that they are affirming the law of the previous cases in their own and other jurisdictons, and the very cases they cite stand for an opposite proposition.[22]

In reading the reports one must be very careful to see what question the court is discussing. There often arise such questions as: whether the defendant knew the facts proved in evidence, since facts may exist which would lead a reasonable man to act, all of which the particular defendant may not have known; whether he sincerely believed them; whether he has cause to believe them to be correctly reported to him; whether, even though the facts proved constituted probable cause and the defendant knew of them, he had knowledge of other facts which rebutted them. While very closely related to probable cause, these are nothing more than preliminary questions of fact necessary to the determination of that issue.[23]

---

[16]That was probably all the court intended in Wass *v.* Stephens (1891) 128 N. Y. 123, 127, when it said "if [the facts are] disputed or if capable of opposing inferences the question is for the jury." In that case, the lower court had submitted the question to the jury, evidently with alternative instructions. The verdict was for the plaintiff, and upon appeal by the defendant, plaintiff's counsel contended merely that the question "should be left to the jury under instructions." (p. 125) Then too, James *v.* Phelps (1840) 11 A. & E. 483, the one case relied on by the court in the instant case, reversed the lower court on the ground that different inferences of *fact* could have been made.

[17]The court so held in Clinchfield Coal Corp. *v.* Redd, *supra*, footnote 2.

[18]See *supra*, footnote 12.

[19]*Supra*, footnote 1.

[20](1915) 216 N. Y. 118, 121, 110 N. E. 179.

[21]The consequence of such a holding is that reasonable cause is put on exactly the same basis as negligence and other similar questions in this respect.

[22]See cases cited in footnotes 10 and 12.

[23]Siefke *v.* Siefke (1896) 6 App. Div. 472, 39 N. Y. Supp. 601; Stewart *v.* Sonneborn, *supra*, footnote 10, at p. 194; Starkie, Evidence (10th Amer. ed. from 4th London ed. 1876) *782, *783.

In many cases what seems to have been left to the jury was the inference of probable cause, but on analysis it appears that it was only one of the preliminary questions of fact just stated.[24] Very often, too, the courts themselves think they are discussing reasonable and probable cause, when actually they are considering one of the preliminary questions of fact. Thus in *Comerford* v. *Morwood*,[25] the court states that "under the circumstances it was for the jury to say whether the defendant caused the criminal action against the plaintiff to be instituted without probable cause", and then goes on to say that "where there is a substantial dispute as to what the facts are, it is for the jury to determine what the truth is and whether the circumstances relied on as a charge or jusification are sufficiently established, and for the court to decide whether they amount to probable cause." Two more contradictory statements could hardly be found.

There is little doubt that the common law rule is that the inference of probable cause, though a question of fact, is for the court. This rule has been criticized[26] and appears to have been altered by the New York courts. While the courts may feel that a change is necessary, much confusion would be avoided among the appellate courts and much error in the trial courts, if the judges were to state their opinions in clear language and realize the true meaning of their statement.

CURRENT LEGISLATION

SMALL CLAIMS COURTS IN THE UNITED STATES.—Recent Massachusetts legislation, which alters materially the method of settling small claims, is of peculiar interest due to the discussion aroused during the past year by the publication of Mr. Reginald Heber Smith's "Justice and the Poor."[1] The Massachusetts enactment is the latest of a series of provisions passed during the last ten years by American legislatures for the purpose of improving inferior courts.

It provides[2] that the justices of police, district and municipal courts shall make uniform rules applicable to such courts, for the purpose of determining according to substantive law claims in contract and tort, other than actions for libel and slander, where the amount claimed is less than thirty-five dollars. Justices of the city of Boston are to make separate rules for the regulation of the courts of that city. Payment of a fee of one dollar, and a statement of claims to a clerk of the court

---

[24]Panton *v.* Williams, *supra,* footnote 12, at pp. 193-194.

[25](1916) 34 N. Dak. 276, 158 N. W. 258, 260. Also see similar contradictory and confused statements in March *v.* Vandiver (1914) 181 Mo. App. 281, 168 S. W. 824, 825; and Hanser *v.* Bieber (1917) 271 Mo. 326, 197 S. W. 68, 72.

[26]Thayer, *op. cit.,* 231. The Scotch law seems to be otherwise. See the statement of Lord Colonsay, a Scotch Lord, in Lister *v.* Perryman, *supra,* footnote 3, at p. 521.

[1]Carnegie Foundation for the Advancement of Teaching, Bulletin No. 13, (1919).

[2]Mass., Acts 1920, c. 553.